

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRYAN K. KENT)	
Claimant)	
VS.)	
)	Docket No. 163,240
SCHMIDTLEIN ELECTRIC, INC.)	
Respondent)	
AND)	
)	
TRINITY UNIVERSAL INSURANCE)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the Order on Subrogation dated February 24, 1998, entered by Administrative Law Judge Floyd V. Palmer. The Appeals Board heard oral argument on October 14, 1998.

APPEARANCES

Phillip L. Turner of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley of Topeka, Kansas, appeared for the respondent and its insurance carrier.

RECORD

The record consists of those documents compiled by the Division of Workers Compensation in this proceeding. In addition, the Appeals Board takes official notice of the documents filed in Shawnee County District Court Case No. 92-CV-1634 that are copied and attached to the parties' briefs to the Appeals Board.

ISSUES

Claimant sustained a work-related accident on January 22, 1991. In addition to receiving workers compensation benefits, claimant sued a third party for its negligence in the accident and collected a judgment and interest in the sum of \$882,659.05. Citing K.S.A. 44-504, the respondent and its insurance carrier applied to the Division of Workers Compensation for satisfaction of its subrogation claim including a credit against future payments of workers compensation benefits.

On February 24, 1998, Judge Palmer entered the following Order:

Wherefore, respondent, insurance carrier and Workers Compensation Fund are granted their full subrogation lien and credit per K.S.A. 44-504, upon all of claimant's net recovery of \$835,504.56 for all benefits paid or to be paid to claimant under the Workers Compensation Act, K.S.A. 44-501, et seq. As of February 16, 1998, respondent and insurance carrier has paid (or there is due) \$87,292.00 in temporary disability compensation and said sum increases by \$278.00 per week, together with medical expenses of \$13,740.73, as of March 12, 1996, and interest at the judgment rate from November 18, 1994 on amounts paid by respondent and insurance carrier up to that date and as increased annually thereafter, until fully satisfied. Respondent and insurance carrier, and Fund to bear their proper pro-rata share of claimant's attorney's fees and expenses in the third-party action.

Claimant appealed Judge Palmer's Order to the Appeals Board. The only issues on this appeal are:

- (1) Does the Workers Compensation Division have the jurisdiction and authority to enter either judgment against the claimant or order the claimant to satisfy the amount due and owing respondent and its insurance carrier in their subrogation claim under either K.S.A. 44-504 or any other statute?
- (2) Does the Division have the jurisdiction and authority under K.S.A. 44-504 to apply a credit against future payments of benefits when the respondent and its insurance carrier did not intervene in the District Court action against the third-party tort-feasor to enforce their subrogation lien?

FINDINGS OF FACT

After reviewing the record, the Appeals Board finds:

- (1) Bryan Kent sustained personal injury by accident arising out of and in the course of his employment with Schmidtlein Electric, Inc., on January 22, 1991. Schmidtlein and its insurance carrier have paid certain preliminary workers compensation benefits to Mr. Kent but the claim for that accident is still pending before the Division of Workers Compensation as the proceeding has not been submitted for final award.
- (2) In addition to receiving workers compensation benefits, Mr. Kent filed a civil action in Shawnee County District Court against Taylor Roofing and Sheetmetal, Inc. for its negligence in the January 1991 accident. After deducting 38 percent for the combined negligence of Mr. Kent and a coworker, Mr. Kent obtained judgment in the sum of \$835,504.56.
- (3) The Journal Entry of Judgment was signed and filed on November 18, 1994. After post-trial motions, the funds to satisfy the judgment and interest, \$882,659.05, were deposited

with the District Court and paid out pursuant to court order dated and filed August 17, 1995.

(4) As indicated above, the jury found Mr. Kent and a coworker 38 percent at fault. But the jury did not otherwise apportion the negligence between Mr. Kent and the coworker. Therefore, it is not possible to separate or determine the extent of each individual's negligence.

(5) Schmidlein Electric and its insurance carrier failed to participate in the District Court proceeding or file their notice of subrogation lien. But they now seek satisfaction of their subrogation claim in this workers compensation proceeding.

CONCLUSIONS OF LAW

(1) Under the Workers Compensation Act, the employer is subrogated to the extent an employee recovers damages from a third-party tort-feasor who was either responsible for or contributed to the work-related accident.¹

(2) The employer is subrogated to the extent that workers compensation benefits were paid from the date of accident up to the date of recovery of damages. If the recovery exceeds the total amount of workers compensation benefits that were paid up to the date of recovery, the excess is to be credited against future payments of disability and medical compensation.²

(3) To protect and enforce its subrogation lien, the employer may intervene in the District Court proceeding that the employee initiates against the third party. The District Court shall determine the extent that the intervenor may participate and apportion the costs and fees.³

(4) There is no right to subrogation unless and until the injured worker has obtained a recovery against a third-party tort-feasor. And the date of the recovery determines which version of an amended statute is applicable.⁴ Judgment was entered in November 1994 and satisfied in August 1995. Therefore, K.S.A. 44-504 is the applicable statute.

(5) The Appeals Board interprets the subrogation statute, K.S.A. 44-504, as creating both a subrogation lien and a subrogation credit. The subrogation lien is limited in amount to the total of workers compensation benefits that were actually paid up to the date that damages are recovered. The subrogation credit is limited in amount to the sum that the actual recovery exceeds those benefits that were paid up to the date of recovery.

¹K.S.A. 44-504(a).

²K.S.A. 44-504(b).

³K.S.A. 44-504(b).

⁴Anderson v. National Carriers, Inc., 240 Kan. 101, 727 P.2d 899 (1986); Lemery v. Buffalo Airways, Inc., 14 Kan. App. 2d 301, 789 P.2d 1176, *rev. denied* 246 Kan. 767 (1990).

(6) Both the subrogation lien and subrogation credit are reduced to the extent that either the employer's negligence or the negligence of someone for whom the employer is responsible, other than the injured employee, contributed to the accident or injury.⁵ As indicated above, the jury found Mr. Kent and a coworker 38 percent at fault. But neither the jury nor the court otherwise apportioned the negligence between the two. Determining the percentage of negligence among the parties is the function of the District Court and not that of the Division of Workers Compensation. Here, Mr. Kent has failed to provide a verdict form or other court document that permits the Workers Compensation Division to determine the extent the subrogation credit should be reduced. Therefore, Schmidtlein's subrogation credit is not reduced for the alleged negligence of Mr. Kent's coworker.

(7) The Workers Compensation Act lacks effective means to enforce subrogation liens and claims for those benefits that are paid before the recovery of damages. Actions against third parties must be brought in District Court where the Workers Compensation Division has absolutely no jurisdiction or authority. The Act does not give the Division the authority to enter either a judgment against an employee or order the employee to reimburse an employer the amount of its subrogation claim. Further, unlike the District Court where damages are paid into the court for satisfaction of judgment and dispersal, the Division of Workers Compensation is not paid funds upon which it can attach liens.

(8) The only remedy the Act gives the Division in subrogation claims is the authority to apply a subrogation credit against future disability and medical compensation. In light of the above, Judge Palmer's February 24, 1998, order is set aside to the extent it purports to enter a judgment or lien against Mr. Kent on the subrogation claim for benefits that were paid before damages were recovered. But the order is affirmed to the extent that it provides a credit against benefits that accrued after damages were recovered or will accrue in the future.

(9) The District Court has dispersed the monies paid to it in satisfaction of the judgment against Taylor Roofing, leaving no funds in the Court for the subrogation lien to attach to. Schmidtlein Electric and its insurance carrier, however, may pursue a separate action to attempt to recover its subrogation claim where the parties may address any defenses that may exist.

(10) Judge Palmer ruled that Schmidtlein, its insurance carrier, and the Workers Compensation Fund were to bear a pro-rata share of the attorney fees and expenses that Mr. Kent incurred in the District Court proceeding against the third party tort-feasor. Under the subrogation statute, the Workers Compensation Division is not given the authority to either apportion or order the payment of fees that may be due and owing in the third-party action. Therefore, Judge Palmer's order is set aside to the extent it purports to apportion attorney fees in the third-party action.

(11) An employer does not waive its right to a subrogation credit against future workers compensation payments when it fails to either intervene or file its notice of lien in District Court. By neither participating nor filing its notice of lien in the District Court proceeding, an

⁵K.S.A. 44-504(d).

employer loses the opportunity to enforce a lien on the judgment. But the employer may then choose to either pursue its subrogation claim in a separate civil action or seek its subrogation credit only. The Workers Compensation Act does not condition the subrogation credit upon timely filing a notice of lien in the District Court.

AWARD

WHEREFORE, the Appeals Board modifies the February 24, 1998, Order on Subrogation and grants a subrogation credit to the respondent and its insurance carrier for workers compensation benefits that accrued after the date of the recovery of the damages to the extent the recovery exceeds the amount of benefits that were paid up to that date. To the extent the order purports to apportion fees and costs between the parties or to either grant judgment against claimant or order the claimant to pay a subrogation claim or lien, the order is set aside.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip L. Turner, Topeka, KS
Matthew S. Crowley, Topeka, KS
Bob W. Storey, Topeka, KS
Philip S. Harness, Director

